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No. 87-1043

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
Petitioner,
v.
RON PAIR ENTERPRISES, INC.,
Respondent.

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether Section 506(b) of the Bankruptcy Code entitles a non-consensual lien creditor to receive post-petition interest on an over secured claim in a bankruptcy proceeding.

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STATUTE

11 U.S.C. § 506(b) ..... *passim*

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SUMMARY OF ARGUMENT

The Bankruptcy Court and the Court of Appeals correctly relied on both pre-Code as well as Code cases in interpreting 11 U.S.C. § 506(b). It is clear that 11 U.S.C. § 506(b) is intended to codify pre-Code law prohibiting the payment of post-petition interest on pre-petition non-consensual lien claims. Nothing in the legislative history indicates that 11 U.S.C. § 506(b) was intended to overrule the longstanding prohibition against paying post-petition interest on pre-petition non-consensual lien claims.

There is no "natural reading" of § 506(b), nor does its grammatical structure give it a "plain meaning", as is self-evident from the history of this appeal, the differences of opinion among the Bankruptcy Courts and the split of authority between the Court of Appeals for the Fourth Circuit and the Courts of Appeals for the Sixth and First Circuits.

It is immaterial that many bankruptcy courts have followed the minority line of reasoning among the courts of appeals by permitting the holder of any unsecured claim to recover post-petition interest. Those decisions are wrong. The Supreme Court should not disturb the decision of the Court of Appeals for the Sixth Circuit which was correctly decided.

ARGUMENT

A. The Historical Background

To interpret correctly the reach of 11 U.S.C. § 506(b) it is crucial to study those cases which preceded enactment of the Bankruptcy Code and to understand the rationale contained in those cases for denying post-petition interest to the IRS on a pre-petition tax lien claim.

The general rule in bankruptcy and other insolvency proceedings is that interest ceases to run on secured and unsecured claims with the initiation of the proceeding, i.e., the filing of the petition. *Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156 (1946); *City of New York v. Saper,* 336 U.S. 328 (1949); *Sexton v. Dreyfus,* 219 U.S. 339 (1911).

As the Supreme Court in *Thomas v. Western Car Company,* 149 U.S. 95 (1893) explained:

> Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. . . As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.

In *City of New York v. Saper, supra,* the Supreme Court held that the general prohibition against the payment of post-petition interest also embraced tax claims in bankruptcy cases.

> The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to 64(a) and 57(n). Considered in conjunction with the general rule against post-bankruptcy interest as well as 63's limitations of interest on other claims to date of bankruptcy, they compel our conclusions, already stated, that the *statute as amended did not contemplate any exception in favor of tax claims.* (Emphasis added).

336 U.S. at 338.

Saper's ban on post-petition interest for tax claims had been extended to Chapter X Reorganizations, *United States v. Edens,* 189 F.2d 876, 877 (4th Cir. 1951), *aff'd per curiam,* 342 U.S. 912 (1952); Chapter XI Arrangements, *Commonwealth of Massachusetts v. Thompson,* 190 F.2d 10, 10-11 (1st Cir. 1951), *cert. denied,* 342 U.S. 918 (1952); *United States v. General Engineering and Manufacturing Co.,* 188 F.2d 80, 81-83 (8th Cir. 1951), *aff'd per curiam,* 342 U.S. 912 (1952) and Section 77 railroad reorganizations, *In re New York, New Haven and Hartford Railroad Co.,* 304 F.Supp. 1121, 1129-32 (D. Conn. 1969).

Following *Saper* the Government attempted to have the courts confine that ruling to pre-petition tax claims not reduced to liens. Three District Courts were not so persuaded. *In re Industrial Machine & Supply Co.,* 112 F.Supp. 261 (W.D. Pa. 1953); *In re Lykens Hosiery Mills,* 141 F.Supp. 895 (S.D. N.Y. 1956) and *In re Came-*

ron, 166 F.Supp. 400 (S.D. Cal. 1958), *aff'd U.S. v. Bass,* 271 F.2d 129 (9th Cir. 1959). *Contra, In re Parchem,* 166 F.Supp. 724 (D. Minn. 1958); *In re Ross Nursing Home,* 2 B.R. 496 (Bankr. E.D. N.Y. 1980).

As Judge Sobeloff pointed out in *United States v. Harrington,* 269 F.2d 719, 721 (4th Cir. 1959), "The opinion of the Supreme Court in the *Saper* case seems to have been intended to put the question to rest once and for all."

> Mr. Justice Jackson, speaking for this Court, pointed out that:
>
> "* * *. More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction, but, rather a fundamental principle of the English bankruptcy system which we copied. *Sexton v. Dreyfus,* 219 U.S. 339, 344 [31 S.Ct. 256, 257]. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary.* * *" *City of New York v. Saper, supra,* 336 U.S. at Page 330, 69 S.Ct. at Page 555.

Notwithstanding the clear broad ban on post-petition interest, non-consensual lien creditors have created three exceptions to the general rule with respect to accruing interest post-petition on pre-petition secured claims. In insolvency cases the argued interest may accrue:

(1) when the bankrupt ultimately proves to be solvent;

(2) the security held by the creditor as collateral produces income after the filing of the petition; and

(3) the collateral is sufficient to pay interest as well as the principal amount of the claim. *In re Walsh Construction, Inc.,* 669 F.2d 1325, 1330 (9th Cir. 1982); *In re Kerber Packing Company,* 276 F.2d 245, 246-47 (7th Cir. 1960); *United States v. Bass,* 271 F.2d 129, 130 (9th Cir. 1959); *In re Macomb Trailer Coach, Inc.,* 200 F.2d 611, 611, 613 (6th Cir. 1952), *cert. denied,* 345 U.S. 958 (1953), and *United States v. Harrington, supra* noting that the Supreme Court did not appear to have recognized the third general exception.

However, five Courts of Appeal in cases decided under the Bankruptcy Act determined that the IRS does not fall within the third exception which permits payment of post-petition interest on a pre-petition tax lien claim. Exception three does not apply to non-consensual liens, such as tax liens. *Kerber Packing, supra; United States v. Bass, supra; United States v. Harrington, supra; United States v. Mighell,* 273 F.2d 682 (10th Cir. 1959); and *In re Boston and Maine Corp.,* 719 F.2d 493 (1st Cir. 1983).

Prior to the enactment of the Bankruptcy Code no Federal Court of Appeals had decided otherwise. Although the Fourth Circuit took a different stance in *In re Best Repair Company, Inc.,* 789 F.2d 1080 (4th Cir. 1987), that Court did not correctly examine the Code language nor did it properly examine the analysis and rationale contained in the pre-Code cases.

As previously stated the IRS grounds its request for post-petition interest on 11 U.S.C. § 506(b):

> To the extent that an allowed secured claim is secured by property the value of which, after any re-

> covery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement under which such claim arose.

A careful reading of § 506(b) leads one correctly to conclude that it is a codification of existing law mandating the general prohibition against allowing post-petition interest on an allowed secured claim filed in bankruptcy. *In re Churchfield,* 62 B.R. 339, *recon. den.,* 66 B.R. 30 (E.D. Mich. 1986); 3 *Collier on Bankruptcy,* ¶ 506.05 at 506-38 n. 1 (15th ed. 1988); *contra, In re Loveridge Machine & Tool Co.,* 36 B.R. 159 (D. Ut. 1983). The third exception is that "the security (collateral) is sufficient to pay interest as well as the principal amount of the claim." As perceptively pointed out by Bankruptcy Judge Spector in *Churchfield, supra* at 658 (Bankr. E.D. Mich. 1986), "Before there was a Bankruptcy Code there was a Bankruptcy Act." Accordingly, the analysis set forth in the pre-Code cases is controlling and must govern here.

The Seventh Circuit in *In re Kerber Packing Company,* 276 F.2d 245 (7th Cir. 1960), distinguished the Government's secured status as the result of a statutory lien from those creditors who held consensual liens.

> The third exception to the rule that interest does not accrue subsequent to filing provides protection to the creditor in his security which on liquidation produces a sufficient amount to satisfy the encumbrance and interest thereon. In the case of a mortgage or deed of trust, an *encumbrance is placed on the property voluntarily by the debtor as security for his deed after agreement with the creditor.* By this act the debtor authorizes not only the satisfaction of the deed

> out of the sale of the particular property but agrees to the payment of any deficiency that might arise after the sale and that other property he may own may be subjected to execution for payment of a deficiency judgment.
>
> This exception has been recognized by the courts to the extent of allowing post-bankruptcy interest to *creditors who are deemed to have bargained for collateral to secure not only the principal obligation but the interest thereon as well.* Usually the allowance has been in cases involving either mortgages, deeds of trust, bonds secured by collateral or a vendor's lien on a particular chattel and involving liens upon specific property of the bankrupt growing out of a contract between him and the creditor. (Emphasis added).

276 F.2d at 247. *Kerber* denied the IRS' request for post-petition interest in accord with the decisions of the Fourth, Ninth and Tenth Circuits.

In re Newbury Cafe, Inc., 841 F.2d 20 (1st Cir. 1988) (pet. for cert. filed April 28, 1988) was correctly decided. *Best Repair Co.,* 789 F.2d 1080 (4th Cir. 1987) is wrongly decided. It completely ignores the pre-Code cases on this issue and ascribes undue import to the word "any", which is no more than mere surplusage. There is nothing to evidence a hidden Congressional intent to change existing law.

The First Circuit noted that the Fourth Circuit conceded that the legislative history is wholly inconclusive. *In re Newbury Cafe, Inc.,* 841 F.2d at 22 citing *Best Repair Co.,* 789 F.2d at 1082.

> In light of the uniform and extensive pre-Code law, that void is a serious obstacle for [the oversecured non-consensual lien creditor seeking post-petition in-

terest] . . . . In *Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed. 2d 859 (1986), the Court said, at 501,

> The normal rule of statutory construction is that if Congress intends to change the interpretation of a judicially created concept, it makes that intent specific [citation omitted]. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.

In re Newbury Cafe, Inc., supra, at 22.

Section 506(b) is not clear, is not susceptible of only one interpretation, and does not have one "natural meaning".

As the Court of Appeals for the Ninth Circuit held in *United States v. Bass,*

> The principal reason usually assigned for not including liened tax claims within the third exception allowing post-bankruptcy interest to secured creditors is that, as set out in *United States v. Harrington, supra*: ". . . when the creditor extended credit, he *relied* upon the particular security given as collateral to secure both the principal of the debt and interest until payment and, if the collateral is sufficient to pay him, the contract between the parties ought not to be abrogated by bankruptcy. *This rationale has no application to tax liens.*" (Emphasis added.)

271 F.2d at 131.

In *United States v. Bass* the government sought to limit the holding of *Saper* to unliened tax claims, arguing that there was no basis to equate liened and unliened claims with respect to disallowance of post-bankruptcy interest. The Ninth Circuit held otherwise:

> In view of the fundamental principle which normally denies post-bankruptcy interest, as discussed in *City of New York v. Saper, supra,* we do not think extension of this exception is justified.
>
> Collection of the public revenue is a favored object, but we think today it is no more favored than that of protecting remaining creditors from the law's delay to the extent of denying post-bankruptcy interest on tax claims, liened or not.

Bass at 132.

See also *United States v. Mighell, supra,* wherein the court, concurring with *Harrington* and *Bass,* stated in *dicta* that post-bankruptcy interest on liened tax claims must be denied.

The First Circuit has also addressed the issue of allowing interest during the gap period on pre-petition secured tax liens. In *In re Boston and Maine Corp.,* 719 F.2d 493 (1st Cir. 1983), the Debtor's Reorganization Plan provided for cash payment in full for taxes accruing prior to the filing of the reorganization petition, as well as for taxes accruing during the reorganization period. As in the instant case, however, the Debtor's Plan did not provide for post-petition interest on a pre-petition tax lien. The court provided an extensive historical analysis of the general rule that pre-petition claims do not accrue interest after the filing of the petition, noting that the United States Supreme Court in *Saper* confirmed a general prohibition against the payment of post-petition interest on pre-petition tax claims in bankruptcy cases. Listing the three exceptions developed by the Federal courts to permit the payment of post-petition interest on pre-petition se-

cured claims, the court explained that the exceptions were not:

> . . . [r]igid, doctrinal categories. Rather, they are flexible guidelines which have been developed by the courts in the exercise of their equitable powers in insolvency proceedings. The reorganization court must consider whether to grant post-petition interest, not as an abstract matter, but in light of the nature of each claim and the equities of the case before it. [Citations deleted]. At all times the reorganization court must be guided by the basic equitable principle announced in *Vanston*:
>
> It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. [Citation deleted].

719 F.2d at 496.

The Court disagreed with the City of Cambridge's contention that having perfected its lien prior to the debtor's filing of its bankruptcy petition the City became a secured creditor in the amount of its tax lien claim and enjoyed the same status as all other secured creditors.

> Those cases in which courts have applied the third exception, permitting postpetition interest to accrue, have generally involved mortgages, trust deeds, pledges or conditional sales contracts. In all of these circumstances, the creditor's security arises from a voluntarily executed agreement between the debtor and the creditor. The two parties have bargained with reference to a specific security with the expectation that the creditor may sell this security and realize the entire amount of the outstanding obligation, including interest accrued to the date of payment. [Citation omitted]. To deny such a creditor post-petition interest, when the amount of the security is sufficient to cover both the principal and interest due, would undermine the faith of lenders in the efficacy of credit arrangements. Such a loss of confidence could result in a curtailing of the free flow of capital in our economy. [Citation omitted]. Thus, granting post-petition interest to mortgagees and other holders of contractual liens satisfies the expectations of the parties and strikes an equitable balance between the creditors and the debtors.

719 F.2d at 497.

The First Circuit then noted that the Supreme Court had never ruled on the applicability of the third exception, granting post-petition interest when there is sufficient secured collateral, to tax liens. A meaningful distinction can be drawn between contractual liens, such as a mortgage or deed of trust, and statutory liens, such as the City of Cambridge's perfected tax lien.

> A statutory lien depends for its existence solely on a legislative act creating the lien in specified circumstances. No bargaining takes place between the debtor-taxpayer and the taxing entity which is granted a lien; the lien cannot be classified as voluntary.
>
> Further, the payment of the interest, which is secured by the lien, is not contemplated by the parties at the beginning of each tax year. Rather, the imposition of interest on unpaid taxes is more in the nature of an enforcement device assuring the collection of delinquent taxes. In the context of an insolvency proceeding, to grant the taxing entity postpetition interest on its tax lien would impose the "enforcement device" not on the insolvent debtor, but on those lower priority creditors whose claims will go unpaid. To penalize these creditors for the bankrupt's inability to pay its taxes on time violates all notions of equity. [Citations deleted].

719 F.2d at 497

B. The Punctuation Problem

The IRS contends that the pre-Code cases disallowing post-petition interest on pre-petition non-consensual tax lien claims are now of no import and that the wording of 11 U.S.C. § 506(b) reverses those cases. It is apparent that it is not the wording of Section 506(b) upon which the IRS hangs its argument but rather the punctuation, in particular the placement of two commas, which at best are unnecessary and at worst ungrammatical.

But for the two commas which separate the phrase "interest on such claims" from the rest of § 506(b), the IRS would have to concede that interest on the claim would be due only if provided for *under the agreement under which such claim arose.*

Interpreting legislation by punctuation is at best unreliable and at worst seriously misleading. As the Sixth Circuit stated in *Egyptian Supply Co. v. Boyd,* 117 F.2d 608, 611 (6th Cir. 1941):

> It is a well settled rule that punctuation is a fallible standard of the meaning of a statute and is resorted to only as a last resort in construing doubtful statutes. Punctuation marks are no part of an Act and to determine legislative intent, punctuation will be disregarded or the phrase repunctuated if that be necessary in order to arrive at the natural meaning of the words employed. *United States v. Shreveport Grain & Elevator Company,* 287 U.S. 77, 83, 53 S.Ct. 42, 77 L.Ed. 175; *Joy v. St. Louis,* 138 U.S. 1, 32, 11 S.Ct. 243, 251, 34 L.Ed. 843.

Section 506(b) contains seven commas. Nothing indicates that by placing two of those commas around the phrase "interest on such claim", Congress intended to

divorce the payment of interest from the threshold requirement that the over-secured claim arise from an "agreement" and thus be consensual. It appears the drafters of § 506(b) used these two commas to break up an overly long sentence, thus creating the illusion of a parenthetical expression where one does not exist. To make the sentence gramatically correct, the commas should be deleted. The two commas in question create an ambiguity where there is none.

Collier, a leading Bankruptcy commentator, addressed the sentence structure of § 506(b) as follows:

> The sentence structure of 506(b) contains an ambiguity that has created some confusion over the applicable rate for computing interest to be allowed under 506(b). The phrase "interest on such claim" is separated by a comma from the phrase "and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." *Such separation apparently derived from the need the drafters felt to make clear that interest was to be allowed only to the extent it accrued on the claim (as opposed to any other amount). However, such separation raises the question of whether the phrase "provided for under the agreement under which such claim arose" applies to "interest on such claim" or only to "any reasonable fees, costs or charges."*

Notwithstanding the misplaced comma or commas, post-petition interest should be computed at the rate provided in the agreement under which the claim arose, the so-called "contract rate" of interest. The great majority of courts which have considered the issue have utilized the contract rate, and this result appears consistent with prior case law. The legislative history offers little guidance because, while evidencing a Congressional intent to codify pre-existing case law with respect to entitlement to reasonable

> fees, costs, or charges provided under the agreement under which the claim arose, it does not refer to interest.

3 *Collier on Bankruptcy* § 506.05 at 506-43 (15th ed. 1988). (Emphasis added).

Thus, *Collier* posits that the comma was actually inserted to separate the word "claim" from "any reasonable fees, costs, or charges." Without the comma, the Section may have been read to require interest not only on the claim but also on fees, costs and charges.

Collier further points out in Footnote 10 that, in as much as this grammatical ambiguity was present in all prior draft versions of 11 U.S.C. § 506(b) starting with H.R. 6, it cannot be explained as the drafters' desire to divorce interest from the "reasonable" qualifier which appears only in later versions. Noting *Loveridge Machine and Tool Company Inc.*, 36 B.R. 159 (Bankr. Utah 1983), *Collier* further states:

> [b]ased on the assumption that 11 U.S.C. § 506(b) allows post-petition interest on non-consensual lien claims, [*Loveridge*] explains the grammatical structure as necessary to provide for situations in which there is no agreement. If one accepts that assumption, *which constitutes the minority view*, that explanation is logical.

3 *Collier* at 506-43, Footnote 10.

A contrary, and incorrect, interpretation of the placement of the commas was made in *In re Best Repair Company, Inc.*, 789 F.2d 1080, 1082 (4th Cir. 1986).

> The phrase "interest on such claim" is set off by commas, and the following phrase is introduced by "and any." The effect of this usage is to make "interest on such claim" a separate and distinct clause to which "provided for under the agreement" does not apply. If Congress had wanted the agreement proviso to limit "interest on such claim" to consensual claims, it could have easily have done so by listing seriatim and in parallel form the different items an over-secured creditor can recover subject to an agreement. Though Congress could have more clearly separated the interest clause from the agreement clause, we think that the natural meaning of its chosen words is to permit post-petition interest on non-consensual over-secured claims.

Confronted with the identical issue now before this Court in *In re Churchfield*, 62 B.R. 339, *recon. den.*, 66 B.R. 30 at 658, Judge Spector respectfully disagreed with the Fourth Circuit's conclusion that § 506(b) contains "plain terms" which compel the result it reached.

> Not being an authority on English grammar punctuation, we find that the words and punctuation of the Statute are hopelessly ambiguous, and so move on to analyze their meaning through examination of legislative intent, which even the Fourth Circuit believed was necessary and appropriate.

Churchfield, supra at 658.

The legislative intent clearly did not change existing case law.

The Notes of Committee on the Judiciary, Senate Report No. 95-989 state:

> Subsection (b) *codifies current law* by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the *agreement under which the claim arose*." (Emphasis added).

This language is repeated in the Legislative Statements found in the Historical and Revision Notes:

> Section 506(b) of the House amendment adopts language contained in the Senate amendment and rejects language contained in H.R. 8200 as passed by the House. *If the security agreement between the parties provides for attorneys' fees*, it will be enforceable under Title 11, notwithstanding contrary law, and is recoverable from the collateral after any recovery under 506(c).

Legislative history does not indicate that by enacting § 506(b) Congress affirmatively intended to change existing law concerning the general prohibition against paying post-petition interest on pre-petition secured claims to include non-consensual tax liens:

> Pre-Bankruptcy Code precedent more strongly supports the latter view (IRS not entitled to post-petition interest on secured tax claim), and there is no evidence in the legislative history of 26 U.S.C. 6621 of Congressional intent to change that result.

3 *Collier on Bankruptcy*, § 506.05, pp. 506-40.

In the face of the confusing commas, § 506(b)'s ambiguity, and the absence of any indication whatsoever that Congress intended, considered, or even contemplated changing the case law which preceded enactment of § 506 (b), pre-Code cases should continue to govern.

The Courts of Appeal for the Sixth and First Circuits correctly rejected the reasoning in *Best Repair, supra* in concluding that the placement of a comma and the inclusion of the words "and any" do not evidence an intention to reject the well-established judicially created

concept. As stated by the Sixth Circuit "the admitted lack of legislative history on this point lends further credence to [its] position. If Congress intended to depart from pre-Code law with respect to only this one portion of Section 506(b), . . . such an intent must be expressed explicitly and not through the ambiguous use of a comma . . . ." *In re Ron Pair Enterprises, Inc.*, 828 F.2d 367 (6th Cir. 1987).

C. The Post-Code Cases

A number of post-Code cases have either directly or indirectly addressed Section 506(b)'s application to non-consensual secured claims. *In re Newbury Cafe*, 841 F.2d 20 (1st Cir. 1988); *In re Bormes*, 14 B.R. 895 (Bankr. D.S.D. 1981); *In re Brooks*, 24 B.R. 447 (Bankr. D. Kan. 1982); *In re Hernando Appliances, Inc.*, 41 B.R. 24 (Bankr. N.D. Miss. 1983); *Matter of Maimone*, 41 B.R. 974 (Bankr. D. N.J. 1984); *In re Best Repair Co. v. United States of America*, 789 F.2d 1080 (4th Cir. 1987); *In re Henzler Manufacturing Co.*, 55 B.R. 194 (Bankr. N.D. Ohio 1985); *Loveridge Machine & Tool Co., supra; In re Trent*, 42 B.R. 279 (Bankr. W.D. Va. 1984); *In re Angelo Russo*, 63 B.R. 335 (Bankr. D. Mass. 1986); *In re Colegrove*, 771 F.2d 119 (6th Cir. 1985); *In re Churchfield, supra; In re Busman*, 5 B.R. 332 (Bankr. E.D. N.Y. 1980); *In re Stack Steel and Supply Company*, 28 B.R. 151 (Bankr. W.D. Wash. 1983); *In re Samuel and Rose Lee Venable*, 48 B.R. 853 (Bankr. S.D. N.Y. 1985); and *In the Matter of United Refining Company*, — B.R. — (Bankr. S.D. Tx. 1988).

In *In re Stack Steel and Supply Company*, 28 B.R. 151, the court determined that the State of Washington's

properly filed tax lien was not entitled to post-petition interest as the third exception to the general rule is not applicable to tax liens. The rationale of a consensual contractual relationship has no application to tax liens.

Although *In re Samuel and Rose Lee Venable,* 48 B.R. 853, deals with the taxing authority's objection to confirmation of a Chapter 13 Plan, the facts and analysis are clearly applicable. The City of Mount Vernon claimed post-petition interest as an administrative expense tax priority under 11 U.S.C. 507(a)(1) on unpaid pre-petition real estate taxes which were a lien against the real property. Judge Schwartzberg disagreed.

In denying the claim the Court noted that the concept that an over-secured creditor may assert its right to post-petition interest was codified under 11 U.S.C. § 506(b).

> The statutory language expressly makes reference to the requirement that interest, as well as fees, costs or charges, must be "provided for under the agreement under which such claim arose." The necessity for a consensual authority has application to mortgages, trust deeds, pledges or conditional sales contracts where the secured creditor and the debtor have voluntarily bargained with reference to a specific security, including the realization of interest until the date of payment. The courts have permitted post-petition interest in such instances in support of the efficacy of credit arrangements and in furtherance of the expectations of the parties and have denied post-petition interest on statutory liens, which are beyond the area of voluntarily contracted debts. [Citations omitted.]

12 B.C.D. at 1208.

The *Venable* Court remained unpersuaded that *In re Busman,* 5 B.R. 332 (Bankr. E.D. N.Y. 1980) required post-petition interest on pre-petition tax liens.

> Accordingly, the City must draw strength for its post-petition interest claim on unpaid pre-petition taxes from sources other than 11 U.S.C. 506(b) *because this section does not support the post-petition payment of interest on noncontractual statutory tax liens.* (Emphasis added.)

The United States asserts that an undefined majority of the post-Code cases may support the IRS' position. However, it is elementary that, it is not the number of post-Code cases, but rather the correct interpretation of § 506(b), which must govern. Further, a majority of the Courts of Appeal have decided this in accord with the long standing rule prohibiting post-petition interest to non-consensual lien creditors. Moreover, the split of opinion as to the correct interpretation of § 506(b), supports the Debtor's position that at best § 506(b) is ambiguous. The ambiguity and the absence of any indication that Congress intended to change pre-Code law, means the pre-Code cases must govern.

D. The Best Repair Decision

The Fourth Circuit's *Best Repair* decision, promulgated less than a week before the District Court heard oral arguments on the instant case, does not mandate a different result. *Best Repair's* finding that the "plain meaning" of § 506(b) permits the IRS, or any other oversecured non-consensual lien creditor, to accrue post-petition interest on its pre-petition lien is simply wrong. *Best Repair* appears to have completely ignored the historical analysis of the pre-Code case law. This is surprising in

light of the well reasoned District Court opinion from which the appeal was taken. *In re Best Repair Company, Inc.,* 789 F.2d 1080 (4th Cir. 1987). Noting the "confusing comma" issue, the District Court characterized its review of the entire legislative history of 11 U.S.C. § 506(b) as inconclusive. Recognizing that § 506(b) is ambiguous and reviewing the split in the case law on its interpretation, Judge Doumar reversed the Bankruptcy Court's allowance of post-petition interest to the IRS.

> The wisdom of the *Harrington* case remains vital today, notwithstanding the passage of 506(b). Faced with the recent and ambiguous subsection, 11 U.S.C. 506(b) on the one hand, and a prior Fourth Circuit decision squarely on point, *United States v. Harrington, supra,* this court will follow the Fourth Circuit case which rejected post-petition interest on non-consensual, oversecured tax claims. The court construes 506(b) as authorizing such post-petition interest only if bargained for under a consensual agreement between the creditors and the debtor.

50 B.R. at 388.

In *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 108 S.Ct. 626, 98 L.Ed.2d 740, 56 USLW 4107 (January 20, 1988) this Court rejected claims of undersecured creditors for post-petition interest on their claims. This Court stated that § 506(b) merely codifies pre-Code bankruptcy law. Acknowledging the pre-Code rule denying such interest, the Supreme Court stated that had Congress nevertheless meant to give undersecured creditors interest on the value of their collateral it would have said so plainly in § 506(b). *See United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 108 S.Ct. 626 (January 20, 1988).

As the Supreme Court stated in *Timbers of Inwood*:

> Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute, c.f. *Kelly v. Robinson,* 479 U.S. 36 (1987); it is most improbable that it would have been made without even any mention in the legislative history.

United Savings Association of Texas, 56 U.S.L.W. at 4109.

As the Supreme Court ruled in *Kelly v. Robinson,* 479 U.S. 36 (1987):

> Just last Term we declined to hold that the new Bankruptcy Code silently abrogated another exception created by courts construing the old Act. In *Midlantic National Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. 494 (1986), a trustee in bankruptcy asked us to hold that the 1978 Code had implicitly repealed an exception to the trustee's abandonments power . . . . We stated:
>
> "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in conserving the scope of bankruptcy codification."

The United States filed an *amicus* brief in *Midlantic,* supra. In its brief it stated that "Congress is, of course, presumed to have codified the judge-made law existing at the time of its consideration and enactment of [the Bankruptcy Code provision of issue]." *See Midlantic National Bank,* supra, Brief for the United States as amicus curiae supporting respondents, page 16. Suddenly the United States proffers an inconsistent and diametrically opposed view when it appears to suit it. In fact the United States was correct in *Midlantic,* as this Court found.

In *Matter of United Refining Company,* — B.R. — (Bankr. S.D. Tx. 1988) the Government again failed to convince a court that the Bankruptcy Code had been drafted with the intent to disturb the preexisting rule that non-consensual lien claimants are not entitled to post-petition interest. Bankruptcy Judge Wheless noted the clear, well reasoned decisions of the First and Sixth Circuit Courts of Appeal and stated:

> Basing their decision on the well-founded precept of statutory construction that " . . . if Congress intends for legislation to change the interpretation of the judicially created concept, it makes that intent specific.", the Court found that § 506(b) did not allow post-petition interest to an oversecured non-consensual lien holder (i.e. the DOR). *See Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) . . .
>
> In view of the two well-reasoned opinions cited above, this Court finds that the IRS is not entitled to post-petition interest based on 11 U.S.C. § 506(b).

In the Matter of United Refining Company, Bankruptcy Case No. 83-03935-H2-5 (Bankr. S.D. Tx. 1988). Respondent is informed that, in its brief *Amicus Curiae* to be filed herein, United Refining will also specifically address individual arguments presented by the United States in its brief.

SUMMARY

The issue here is whether 11 U.S.C. § 506(b) applies to pre-petition non-consensual tax lien claims so as to permit interest on those claims to continue to accrue after the filing of the bankruptcy petition until confirmation of the Debtor's Plan. Section 506(b) is a codification of the general rule prohibiting such post-petition interest on a pre-petition non-consensual tax lien claim. The Section's legislative history is silent as to how Congress intended to deal with the payment of such interest and there is no indication that congress intended to overrule prior, virtually unanimous, case law on this point. As recognized by the United States Supreme Court, silence is dangerous when one is attempting to overrule judicially created concepts. *Watt v. Alaska,* 451 U.S. 259 (1981). If Congress intends for legislation to change the interpretation of the judicially created concept, it make that intent specific. *Midlantic National Bank v. New Jersey,* 474 U.S. 494 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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